Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
InterCall, Inc.	)	
	)	CC Docket No. 96-45
Appeal of Decision of the Universal Service Administrative Company and Request for Stay	)	

To: Wireline Competition Bureau

REPLY COMMENTS OF INTERCALL, INC.

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SUMMARY

The initial comments filed in this matter show a remarkable degree of consensus on the core issues supporting InterCall's appeal and request for stay of the USAC Administrator's Decision. *First*, all stand alone audio bridging companies that filed – without exception – confirmed InterCall's contention that such conferencing companies have operated on an unregulated basis for the full history of their more than two decade old industry. They all assert that they have never considered themselves to be telecommunications carriers, and accordingly have never obtained FCC 214 licenses or complied with other FCC reporting or filing requirements. Correspondingly, since they have not been considered or treated as telecommunications carriers, virtually none of the scores of such stand alone bridging companies have ever registered with or reported to USAC, and instead contribute to the FUSF by paying USF surcharges levied upon them by their underlying vendors of toll-free interexchange services. Finally, they demonstrate convincingly that the Commission has long been aware that such stand alone audio bridging companies believe that they are not required to register with USAC, and has knowingly acceded to that position.

Second, while there may be disputes about where the lines are drawn, all commenters agreed that the audio bridging component is distinct from the transmission input used to reach the service. Integrated or carrier-based providers of conferencing self-provide the transmission input and thus must report the revenues from their conferencing services directly to USAC. When doing so, they are permitted by USAC procedures to either treat all revenue as USF assessable or make a reasonable allocation of the assessable telecommunications and non-assessable non-telecommunications components of the service. By contrast, conferencing companies that do not own or operate transmission networks have routinely and consistently

been treated as end user customers by the suppliers of their toll-free access services, and have paid FUSF on their telecommunications inputs indirectly by paying USF surcharges. In both cases USF has been paid, and the only dispute is whether USAC should be permitted to regulate stand alone audio bridging providers directly and collect double payments retroactively.

Third, out of all commenters participating, only Verizon suggests that stand alone audio bridging companies operate as telecommunications carriers. Not surprisingly, all stand alone conferencing company commenters disagree. But it is notable that Verizon's position also gets no support from other RBOC/IXC and industry expert commenters. The reason for Verizon's isolation is simply because it is wrong. The record herein is clear that stand alone audio bridging companies do not offer telecommunications transmission, do not route calls and do not operate as toll resellers. As several commenters make clear, Verizon's position recently was rejected squarely by the FCC which ruled unanimously only last October that conferencing companies are end users and not telecommunications carriers.

Fourth, no commenter attempted to reconcile the USAC Administrator's overreaching in interpreting a brief reference to "toll teleconferencing" in its instruction forms to effectively amend the Commission's rules to add stand alone conferencing companies to the list of mandatory filers. While a couple of commenters noted the existence of the language in the instructions, no one tried to explain how a line included in a form adopted without notice and comment, and made available for integrated providers to report the self supplied telecom input to their own conferencing services, could reasonably be twisted to transform an unregulated industry segment into a regulated one by administrative fiat. By contrast, conference company commenters have explained how the USAC Administrator's interpretation exceeds its authority by engaging in prohibited rulemaking or interpretative activity.

Fifth, all commenters but one agreed that requiring InterCall (or similarly situated conferencing companies) to file forms retroactively would be a manifest injustice and cause enormous harm. The record makes plain that InterCall reasonably believed that it was not required to report directly to USAC, and operated in an industry standard fashion in paying USF indirectly through its underlying carriers. Critically, the record also makes clear that recovery of amounts already paid to underlying carriers or surcharging customers retroactively is not feasible. On the contrary, any effort to do so will lead to needless industry disruption and litigation. The record indicates that the amounts billed retroactively by USAC could be enough to threaten the economic viability of virtually the entire CSP industry.

Finally, given that USAC's decision is contrary to both binding precedent and industry practice – and the consequence of retroactive application of its determination threatens to cause irreparable harm to conferencing companies, their customers and their carrier suppliers – only one commenter opposed InterCall's request that the Commission vacate and stay the USAC Administrator's Decision while it considers issues raised by the appeal *de novo*. Verizon's solo opposition to the request for stay must be seen for what it is – a not so veiled attempt by an aggressive competitor to misuse the regulatory process to inflict damage on a market rival.

Indeed, the issue which sparked the most disagreement by commenters — precisely how service providers should allocate the assessable telecommunications input and non-assessable non-telecommunications component of the service — is not even an issue raised by InterCall in its appeal and thus is not before the Commission for decision in this proceeding.

With respect to the request for stay, time is of the essence. Unless the Commission acts promptly, USAC will require that InterCall begin filing forms facilitating

unfair and unlawful retroactive assessment beginning as of *March 17, 2008*. It is critical that the Commission act to preserve the status quo before that date by granting the request for stay, and permitting the FCC and the affected industry to proceed deliberately with the issues raised by the appeal. Accordingly, InterCall respectfully requests prompt action by the Commission to preserve its rightful prerogative as the agency that determines USF rules and policies.

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REPLY COMMENTS OF INTERCALL, INC.

InterCall, Inc. ("InterCall"), through its undersigned counsel and pursuant to the Bureau's *Public Notice*, DA 08-371, in this docket, respectfully submits these reply comments in support of its Appeal of the Universal Service Administrative Company's ("USAC") "Administrator's Decision on Contributor Issue," and of InterCall's Petition for Stay of the Administrator's Decision. [1]

This proceeding consolidates two requests made by InterCall. First, in its Appeal, InterCall seeks reversal of the USAC Administrator's Decision concluding that InterCall provides "toll teleconferencing" services as that term is used in the Instructions to FCC Form 499-A. Second – and more immediately – InterCall seeks a stay of the USAC instruction to file current and past due 499 Forms for the services subject to this Appeal. InterCall faces a March

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[1] Request for Review by InterCall, Inc. of Decision of Universal Service Administrator, CC Docket No. 96-45 (filed Feb.1, 2008) ("Appeal"); InterCall, Inc., Petition for Stay Pending Commission Review, CC Docket No. 96-45 (filed Feb. 5, 2008) ("Petition for Stay"); *see* Letter to Steven A. Augustino, Kelley Drye & Warren LLP, Counsel to InterCall, Inc. from USAC, Re: InterCall, Inc. (Jan. 15, 2008) (hereinafter "Administrator's Decision").

17 deadline to file the past due forms, and future filing deadlines thereafter. As a result, InterCall respectfully requests that the Bureau act promptly in response to InterCall's stay request.

In this Reply, InterCall first addresses arguments made concerning the proper classification of audio bridging services under the FCC's universal service rules. This question is relevant to the merits of InterCall's Appeal and, under the *Virginia Petroleum Jobbers* test, to InterCall's entitlement for a stay of the USAC Decision. In Section V of this Reply, InterCall further addresses the *Virginia Petroleum Jobbers* factors, with particular emphasis on the harms that result from the instruction to file current and past due 499 Forms. As explained in that Section, InterCall meets the requirements for granting a stay from the 499 filing obligation.

Argument

I. THE COMMENTS UNANIMOUSLY CONFIRM INTERCALL'S DESCRIPTION OF THE AUDIO BRIDGING MARKET

In its Appeal, InterCall described a market in which stand alone conferencing companies have operated free of regulation -- as end users and not as telecommunications carriers -- in every fashion and on an uninterrupted basis for over 20 years. The initial comments filed in the proceeding confirm InterCall's depiction of the market without exception.[2] All commenting stand alone audio bridging providers made clear that they, too, have operated under the clear understanding that they are not regulated by the FCC and by the same token are not required to register with USAC. Like InterCall, each of these audio bridging providers say that

[2] The following comments were filed in response to the Bureau's *Public Notice* in this docket: Comments of Canopco, Inc. (U.S.) (filed Feb. 22, 2008); Comments of AT&T, Inc.; Comments of Genesys, SA; Initial Comments of Premiere Global Services, Inc.; Comments of Qwest Communications International Inc. in Support of InterCall's Request for Review and Petition for Stay; Comments of TeleSpan Publishing Corporation; Opposition of Verizon. Except as noted, all comments were filed on February 25, 2008 in CC Docket No. 96-45. Throughout this Reply, InterCall shall refer to a party's filing as "[Name of Party] Comments" regardless of how they were captioned.

they have always been treated as end user customers by their underlying telecommunications transport providers and fund USF indirectly by paying the USF surcharges imposed by their vendors. Importantly, the stand alone audio bridging provider comments demonstrate beyond question that the Commission repeatedly considered whether stand alone audio bridging providers are required to register directly with USAC, and knowingly acceded as a matter of administrative practice to the position that current FCC rules do not require such direct reporting. Even traditional telecommunications carriers that provide conferencing and transport on an integrated basis confirm that they have always treated the stand alone audio bridging providers that purchase transport services from them as end user customers, and assess end user USF surcharges on them accordingly. In light of the consistent past industry and FCC practice to treat stand alone audio bridging providers as end users and not as carriers that report directly to USAC, no commenter opposed InterCall's claim that retroactive assessment of USF charges by USAC would be illegal, and all commenters but one explicitly opposed any retroactive assessment as grossly unfair, unjustified, harmful and disruptive.

A. All Commenters Agree that Stand Alone Audio Bridging Providers Consider Themselves End Users and Are Treated That Way by Their Toll-Free Service Providers

As InterCall discussed in its Petition, and other commenters noted, neither the conference calling industry nor the FCC have ever treated conference calling services as subject to common carrier regulation.[3] Commenters including Canopco, Genesys and Premiere all stated that stand alone audio bridging providers purchase telecommunications as end users. Premiere

[3] InterCall Petition at 12-13; *See also, e.g.*, Premiere Comments at 2.

noted that it understood the industry practice to be that audio bridging services were not regulated common carrier service.[4] In particular, Premiere stated:

> When Premiere Global first entered the market for audio bridging services in 1998, it was Premiere Global's understanding, based upon its observation of the practices of other independent providers of audio bridging services and the fact that common carriers offered telecommunications services to Premiere Global for use in its operations as an end user, that such services were not regulated common carrier services.[5]

Premiere explained that "[t]o the extent that tariffs apply to Premiere Global's purchases of telecommunications services, Premiere Global purchases such services from retail tariffs as an end user."[6]

Similarly, Canopco noted that "the company purchases transmission services from other telecommunications carriers as an end user."[7] Canopco also noted that the Commission's determination in *Qwest v. Farmer's Telephone*[8] reflects long-standing industry practice and policy of considering stand alone audio bridging providers (also referred to as "conferencing companies," "Conference Service Providers" or "CSPs") to be end users of telecommunications services. Canopco noted that "[t]he determination and subsequent ruling [referring to the *Qwest* decision] are consistent with the way CSPs have considered themselves and operated for approximately twenty years."[9]

Genesys noted that it responded to a Commission inquiry regarding the services it provided and had not received any further correspondence after sending a response that

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4 Premiere Comments at 2.

5 *Id.*

6 *Id.* (citations omitted).

7 *See* Canopco Comments at 5.

8 *Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone*, 22 FCC Rcd 17973 (2007).

9 *See, e.g.*, Canopco Comments at 4.

"Genesys is an information services provider and end-user of telecommunications services and not a telecommunications services provider and reseller."[10] Even AT&T, in its comments, noted that InterCall purchases services from AT&T and urged the Commission to recognize that "InterCall has already contributed indirectly to some extent via wholesale providers like AT&T, which assessed InterCall universal service fees on toll-free numbers purchased from them."[11] Qwest makes a similar acknowledgment of InterCall's USF contributions and stated InterCall "purchases services from Qwest through retail agreements. Qwest assesses FUSF charges on the interstate telecommunications services that InterCall purchases from Qwest."[12]

Indeed, a 2007 "Segment Report" on the size and scale of the conferencing services market shows just how common is the industry understanding that non-carrier stand alone audio bridging providers are not regulated carriers. The report by Wainhouse Research analyzes the market participation of what it believes to be the approximately 40 largest CSPs. [13] Some of the CSPs analyzed have only international services, web based services or video services; and others constitute the conferencing divisions of facilities-based interexchange carriers. However, a review of the USAC filer status records of the companies in the Wainhouse report confirms that no stand alone provider is listed as a current direct contributor to the USF program.[14] The list of companies that provide such conferencing services and do not contribute

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10 Genesys Comments at 4.

11 AT&T Comments at 1.

12 Qwest Comments at 2.

13 *See*, "North American Collaboration Services Market--2007," Wainhouse Research, LLC (released May 25, 2007).

14 Eleven companies in the Wainhouse Report both file and contribute directly to USAC. A review of the Wainhouse Report, the USAC filer database and the companies' public websites suggests that all eleven are either IXCs, CLECs or interconnected VoIP providers. These eleven companies are: Arkadin, AT&T, ConferencePlus, Global Crossing, GlowPoint/GP Communications, Incomm/US South, Inter-Tel/Mitel, Nortel, Telus, Verizon Business and WebEx.

directly to USF include: ACT Teleconferencing, Adobe, AT Conferencing, Chorus Call, Cisco, Citrix Online, Connex, Corvent, Encounter Collaborative, Free Conference Corporation, Gaboogie, Genesys, Global Conference Partners, iLinc, Infinite Conferencing, Interwise, Live Office, Meeting One, Microsoft, Premiere Global Services, Enunciate, Ring2 Conferencing and WireOne Communications. Of course, this list is partial and does not include the scores of other smaller stand alone audio bridging companies that also have not registered with USAC. Thus, InterCall's view that it is not a regulated telecommunications carrier is not the position of an aggressive industry outlier. To the contrary, InterCall's position in not registering with USAC is consistent with the practice of nearly every other similarly situated company in a large and mature industry.

Similarly, industry practice regarding the sale or purchase of conference call service providers shows that industry participants do not regard these services or transactions as subject to Commission regulation. The Commission's rules contain streamlined procedures permitting telecommunications carriers to acquire, through sale or transfer, all or part of another telecommunications carrier's subscriber base without obtaining customer consent provided that the acquiring carrier notify the Commission at least 30 days prior to the planned transfer.[15] The notice must be filed in CC Docket No. 00-257 and the carrier must provide specific information about the transaction and include a copy of the subscriber notification.[16] For asset purchases or transfer of control transactions that do not involve the transfer of subscribers, the Commission has similar rules providing for prior regulatory approval. Sections 63.03 and 63.04 of the Commission's rules govern such transfers of control or authorization and require the filing of an

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15 47 C.F.R. § 64.1120(e).

16 47 C.F.R. § 64.1120(e)(3).

application for approval with the Commission.[17] Once filed, these applications are assigned docket numbers and a public notice is issued seeking comment on the applications.[18]

There has been considerable recent consolidation in the conferencing industry. If industry participants believed that the stand alone audio bridging providers involved in this merger and acquisition activity constitute regulated telecommunications carriers, they would have been obliged to seek the requisite prior approval of the FCC. But that simply has not happened. TeleSpan, which reports on and closely tracks developments in the conferencing services industry, recently published a list of the most recent 21 purchases of conferencing companies.[19] However, research of the Commission's records shows that *none* of the companies involved in *any* of these transactions made the notification filings or applications for approval required of regulated carriers.[20] InterCall reviewed the Form 499A Telecommunications Reporting database, the FCC's electronic comment filing system database of docketed proceedings and a general search of Commission documents. The searches reveal that this long list of conferencing company mergers and acquisitions did not result in *any* of the filings required of telecommunications carriers providing interstate services. Nor did they result in *any* reported FCC enforcement activity for failure to file. Clearly the universal view of purchasers and sellers alike was that stand alone audio bridging companies are not telecommunications carriers, and were not subject to FCC regulation or USAC jurisdiction – and the Commission accepted this practice by not pursuing enforcement action for failure to file.

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17 47 C.F.R. §§ 63.03, 63.04.

18 *See e.g.*, 47 C.F.R. §§ 63.03.

19 *Electronic TeleSpan,* Vol. 28, No.6 (Feb. 18, 2008) at 3 (excerpt attached hereto as Exhibit 1.

20 Significantly, this list includes acquisitions by AT&T and Verizon (including its predecessor, MCI. The fact that neither AT&T nor Verizon sought approval to acquire a conferencing provider supports InterCall's contention that conferencing companies are not regulated telecommunications carriers.

Notably, Premiere made similar findings when it searched for Commission rules regulating audio bridging services.[21] Premiere explained that:

> an online search of the Code of Federal Regulations indicated that the terms "teleconference," "teleconferencing," "audio conference," "conferencing" and "bridging" do not appear anywhere on the Commission's regulations. Despite substantial efforts over the last several years, Premiere Global has found nothing to suggest that independent providers of audio bridging services might be required to file Form 499 or contribute to the USF as carriers except the two references to "teleconferencing" in the Form 499 instructions.[22]

The record, case law and numerous examples of industry practice of treating conference calling services as unregulated all support InterCall's position that its conference calling services currently are unregulated services and have properly been classified as information or other non-regulated services to date.

B. Other Stand Alone Providers Confirm that the FCC has Knowingly Acceded to the Position that Stand Alone Audio Bridging Providers Are Not Required to Report Directly to USAC

As commenters pointed out, the Commission has conducted several investigations regarding the filing and contribution requirements of stand alone audio bridging providers and consistently has failed to take action, leading to the reasonable conclusion that such conferencing companies are end users of telecommunications and are not required to file Form 499s or contribute directly to the USF. USAC must not be permitted unilaterally to impose a filing requirement which not only exceeds its authority but also conflicts with what appears to be Commission decisions not to require stand alone providers to contribute directly to the USF.

For example, Premiere, in its comments, describes an Enforcement Bureau investigation of Raindance Communications, Inc. ("Raindance") regarding its compliance with

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21 Premiere Comments at 4.

22 *Id.*

Commission registration, reporting and contribution requirements.[23] In March 2004, the Enforcement Bureau initiated an investigation into whether Raindance was required to comply with Form 499-A registration requirements, which compliance requirement would subject Raindance to Commission regulation and the related Form 499 filing and direct USF contribution requirements.[24] In response to this investigation, Raindance notified the Enforcement Bureau that in 2000 the company had been the subject of another Enforcement Bureau investigation into whether its services met the definition of telecommunications services regulated by the Commission.[25] Raindance explained that during the 2000 investigation, the company had discussed its services with Commission staff, and in March 2000 and stated that "the FCC staff informally opined that our services were not regulated telecommunications services, but instead met the definition of unregulated information services and enhanced services."[26] Raindance further noted that the services at issue in the 2000 investigation were the same services provided in 2004.[27] Specifically, Raindance explained that it provided a range of conferencing services, including reservationless audio conferencing via toll-free number dial in.[28] Raindance also noted that it obtained the telecommunications component of those services as an end user and contributed indirectly to the USF through its underlying telecommunications

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23 *Id.* at 2.

24 *See* Letter from Stephanie Anagnosio, SVP & General Counsel, Raindance Communications, Inc. to Hugh L. Boyle, Chief Auditor, Enforcement Bureau (April 15, 2004) (Exhibit 2 hereto).

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.* at 1 & Exhibit C.

carrier.[29] Premiere notes in its comments that "no allegation or finding of liability resulted from the Enforcement Bureau's investigation of Raindance."[30]

Premiere also can speak from its own experiences as its subsidiary, Communications Network Enhancement, Inc. ("CNE"), too has been the subject of a Commission investigation and the Commission again has knowingly failed to take action in that investigation. Premiere explains that in May 2004, the Commission's Enforcement Bureau commenced an investigation into CNE, a stand alone audio bridging provider later acquired by Premiere, regarding CNE's failure to file a Form 499.[31] CNE responded to the Enforcement Bureau, notifying it of discussions with the National Exchange Carrier Association and USAC about CNE's services and NECA's advisement that CNE "was not required to file the 499-A form."[32] The Enforcement Bureau did not send any further correspondence until January 2005 when it sent a letter to Premiere regarding CNE.[33] Premiere responded by attaching a copy of the correspondence previously submitted by CNE regarding NECA's assessment of CNE's filing obligations.[34] Premiere apparently has not received additional correspondence from the Enforcement Bureau as it notes in its comments that "it is Premiere Global's understanding that both Enforcement Bureau investigations of CNE were closed without an order."[35]

In a similar action, the Commission appears to have determined in 2005 that Genesys' conference calling services were not subject to the FCC Form 499 filing or direct USF

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29 *Id.* at 1.

30 Premiere Comments at 3.

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.* at 3-4.

35 *Id.*

contribution requirements.[36] Genesys noted in its comments that in 2005, the Commission sent a letter directing Genesys to respond to a survey of companies identified as being resellers and either to register as a telecommunications reseller or explain why Genesys did not have to register.[37] In its response, Genesys described its conference calling services and explained that it was an information services provider, not a telecommunications carrier subject to reporting and direct USF contribution requirements.[38] Genesys did not register with the Commission.[39] Genesys noted that in the three years that have passed since providing its response to the Commission, the company has not received further correspondence or any indication, written or otherwise, that it was required to register and contribute directly to the USF.[40] Again, the Commission has decided, after soliciting information from a stand alone provider, being told that the provider identifies itself as an information services provider and that the provider is neither filing Form 499s nor contributing directly to the USF, that further Commission action is not necessary.

The services provided by the companies investigated mirror those provided by InterCall. Indeed, subsequent to the FCC investigation discussed above, InterCall purchased Raindance and merged the company into InterCall. The Raindance reservationless conferencing services were identical to those provided by InterCall today. In addition, like the companies discussed above, InterCall also obtains telecommunications services as an end user and contributes indirectly to the USF through the underlying carriers from which InterCall obtains its telecommunications services.

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36 Genesys Comments at 4.

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

In each of these cases the Commission initiated an investigation, was informed that the companies at issue provided conference calling services, believed those services were unregulated information services and consequently the companies would not be registering with the Commission, filing Form 499s or contributing directly to the USF. In each case the Commission appears to have closed the investigation, without issuing an order or taking further action against the companies. Importantly, each of these Enforcement Bureau investigations of the audio bridging companies was conducted and closed *after* USAC's forms were amended in 2002 to include a brief reference to "toll teleconferencing." The Commission's consistent practice of apparently closing investigations and failing to take further action reflects the Commission's position that stand alone providers of conference calling services are not required to comply with USAC reporting, filing or direct USF contribution requirements.

II. AUDIO BRIDGING SERVICES ARE NOT SUBJECT TO DIRECT USF CONTRIBUTION OBLIGATIONS

Verizon alone among the commenters challenge's InterCall's assertion that stand alone audio bridging providers are not "telecommunications carriers." However, in contending that stand alone audio bridging providers are carriers, Verizon blithely ignores recent precedent in which the FCC ruled squarely that these providers are end users (not carriers) and ignores the Commission's clear finding that calls are placed to and terminate at conference bridges. Since it can cite no precedent classifying stand alone audio bridging providers as telecommunications carriers, Verizon attempts to liken conferencing to prepaid calling card services, an analogy that was expressly rejected by the full Commission only four months ago. By contrast, most commenters agree that the decision of the USAC Administrator to treat InterCall as a telecommunications carrier is flatly inconsistent with the way stand alone audio bridging providers operate, general industry practice and an unbroken chain of Commission precedent.

A. The Commission Already Has Decided That Stand Alone Audio Bridging Providers Are Not Telecommunications Carriers

As InterCall discussed in its Petition and Canopco echoed in its comments, Commission precedent clearly establishes that stand alone audio bridge providers are end users of telecommunications services and not telecommunications carriers.[41] Specifically, InterCall and Canopco[42] addressed the Commission's Order, approved unanimously only four months ago, in *Qwest v. Farmers*. There, the Commission specifically addressed whether conference bridge providers were telecommunications carriers or end users of telecommunications services and held that they were end users.[43] InterCall also noted the Commission held similarly in *AT&T v. Jefferson Telephone Company* that providers of "multiple voice bridging service" which "connects incoming calls so that two or more callers can talk with each other simultaneously" are information service providers and thus end users of telecommunications services.[44]

Despite the unmistakable Commission rulings in *Qwest* and *Jefferson Telephone* that conference call services are not telecommunications and the logical conclusion that InterCall is not a telecommunications carrier subject to direct USF contribution requirements, Verizon tries to argue that these orders do not relate to the applicability of USF contribution requirements.[45] Specifically, Verizon argues that "[n]either *Farmers* nor *Jefferson Telephone* addressed the application of the Commission's universal service rules to audio conferencing services." In fact, the *same issue is addressed* in those decisions and in the present case: switched access charges and direct USF contribution obligations apply only to

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41 Appeal at 14-17.

42 Appeal at 14-17; Canopco Comments at 4.

43 *See Qwest v. Farmers*, ¶31.

44 *AT&T v. Jefferson Telephone Company*, 16 FCC Rcd 1610, 16131 (2001).

45 Verizon Comments at 5.

telecommunications carriers so the issue is whether the conferencing companies in those cases, and InterCall in the present case, are telecommunications carriers. The Commission ruled in those cases that stand alone bridging providers were end users, not telecommunications carriers and the same determination must apply here.

Verizon then tries to discredit InterCall's reliance on the *Qwest* decision by arguing that the holding is questionable because the Commission granted a request for reconsideration of the issue.[46] Verizon's characterization of the status of the decision is inaccurate. While partial reconsideration has been granted, the Commission's grant was limited to the consideration of a factual issue concerning when the relationship between the companies at issue was established and whether they provided services in the fashion alleged, not whether stand alone conferencing companies are end users.[47] The reconsideration does not re-open the legal conclusion that stand alone conferencing companies are not carriers.[48]

Even Qwest, the complainant in that proceeding, acknowledged the Commission's holding still stands. Specifically, Qwest stated "Qwest's position that long distance calls to conference bridges were not terminated for purposes of assessing switched access charges had been rejected. . . ."[49] Consequently, the Commission's holding that stand

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46 *Id.*

47 *Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Co.*, Order on Reconsideration, File No. EB-07-MD-001, FCC 08-29, ¶ 6 (Jan. 29, 2008) (granting reconsideration to consider newly-identified factual evidence).

48 *Id.*, ¶ 7. The Commission explains that it found conference calling companies to be end users because they subscribe to services under the tariff. It based its conclusion that the particular companies involved subscribed to the service on "*Farmers*' representation that they purchased interstate End User Access and paid the federal subscriber line charge." *Id.* The new evidence calls that factual representation into question. The principle that conference calling companies are end users when they provide their services is not implicated by this additional factual inquiry.

49 Qwest Comments at 2, n.3.

alone bridging providers are end users has not changed and InterCall can continue to rely on the *Qwest* decision as validation that CSPs are end users.

B. Stand Alone Providers Do Not Provide "Transmission" to End Users

Verizon argues that InterCall's audio bridging service is telecommunications because it "provides for the transmission between end users and the conferencing bridge and routes calls between conference participants."[50] Verizon's arguments are simply wrong. InterCall does not provide "transmission" between two points, nor does it permit the end user to select end points of its choosing. Rather, InterCall purchases toll-free telecommunications services from telecommunications carriers and makes those toll-free numbers available for its customers exclusively in order to access InterCall's audio bridging services. When InterCall's customers use the toll-free numbers to reach InterCall, the calls are terminated at InterCall's bridge. Premiere explained similarly that it provides audio bridging services by "purchasing toll free and local telecommunications services from common carriers and using specialized equipment to connect, or 'bridge' calls from different locations into a single audio conference."[51]

AT&T in its comments recognizes that transmission is distinct from the audio bridging service itself. As AT&T explains, audio teleconferencing consists of "audio bridging services" and "toll-free numbers necessary for customers to participate on conference calls (also referred to as transport or termination)."[52] AT&T further acknowledges a key difference between its (and Verizon's) conferencing offering as compared to InterCall's. "AT&T self-provisions toll-free numbers whereas so-called 'stand-alone audio bridging service' providers

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50 Verizon Comments at 3.

51 Premiere Comments at 1-2.

52 AT&T Comments at 2. Even Verizon appears to agree with this characterization of conference, conceding in its comments that audio conferencing is comprised of both "telecommunications components" and "information services." *See* Verizon Comments at 6-7.

like InterCall purchase this transport from carriers like AT&T."[53] Thus, while companies that self provide transport provide both a non-regulated bridging service *and* an embedded regulated telecom transport service, stand alone bridging providers like InterCall provide only a non-regulated bridging service and purchase inbound telecommunications services from underlying carriers so that their customers can reach them. Hence, both integrated providers like AT&T and stand alone conferencing companies like InterCall pay USF -- it is just that integrated providers report the value of the telecom input to their service directly to USAC whereas stand alone CSPs pay USF surcharges to their interexchange service providers. Indeed, this is a result that is perfectly consistent with the USAC instructions, which omit stand alone conferencing companies from the list of mandatory filers, but provide lines in the reporting form for integrated providers to apportion the telecom and non-telecom portion of their teleconferencing services.

C. Stand Alone Providers Do Not "Route" Calls

Verizon's argument that InterCall – and apparently all other CSPs – route calls also must fail.[54] InterCall's bridge does not switch or route communications from one caller to another, but instead simply bridges together multiple calls that have already terminated at InterCall's bridging platform. This function is the same function analyzed in the *Qwest* case and the Commission's decision there applies equally here. In *Qwest*, the Commission explained that:

> Farmers' view of the calls, however, is that users of the conference calling services make calls that terminate at the conference bridge, and are connected together at that point. We find Farmers' characterization of the conference calling services to be more persuasive than Qwest's.[55]

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53 AT&T Comments at 2.

54 Verizon Comments at 3.

55 *Qwest*, ¶32 (citations omitted).

The Commission then explained that Qwest's theory of a conference call would have anomalous results:

> Qwest's view of how to treat a conference call leads to anomalous results. For instance, suppose parties A, B, C, and D dial in to a conference bridge. According to Qwest, A has made three calls, one terminating with B, one with C, and one with D. But in fact, B, C, and D have actually initiated calls of their own in order to communicate with A. What Qwest calls the termination points are actually call initiation points.[56]

When rejecting Qwest's description of Farmer's conference call services as involving calls initiated to the other parties that have dialed into Farmer's toll free number and terminating at the locations of the other callers, the Commission cited to a definition in Newton's Telecom Dictionary which defined conference calling services as not involving the routing of calls:

> Newton's Telecom Dictionary's definition of a "conference bridge" also seems consistent with Farmers' view, speaking of the callers being connected by the bridge, *rather than describing the bridge as routing the calls on from one caller to another.*[57]

Thus, the Commission has definitively ruled that calls to conference call service providers terminate at the CSP's bridge and that a conference bridge does not route calls to other callers. Verizon's arguments that InterCall routes calls must be rejected.

Verizon further contends – again incorrectly - that its position that conference call services are telecommunications service is supported by the Commission's rulings in the *AT&T Prepaid Calling Card Order* and the *Prepaid Calling Card Order*.[58] Verizon's initial error is its

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56 *Qwest*, ¶33.

57 *Qwest*, ¶32 and n.113 (emphasis added).

58 Verizon Comments at 3-4 *citing AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd 4826 (2005) ("AT&T Prepaid Calling Card Order"); *Regulation of Prepaid Calling Card Services*, 21 FCC Rcd 7290 (2006) ("Prepaid Calling Card Order").

mistaken assumption that conference calling services can be compared with prepaid calling card services. Prepaid calling card service is radically different from conference call services. Specifically, prepaid calling cards permit a user to initiate a call and that call terminates with the called party.[59] In contrast, calls to conference call services terminate at the CSP's bridge, at which point, the bridge connects the multiple calls.[60]

This distinction was key in causing the Commission already to decide that its treatment of prepaid calling services is inapplicable and inapposite to conferencing services. Indeed, in its *Qwest* decision, the Commission explicitly addressed and rejected applying its prepaid calling card decisions to conference calling services. The Commission rejected Qwest's analogies to prepaid calling cards as circular because such analogies assumed that the conference calls were routed to another party when, in fact, the question to be addressed in the *Qwest* case was *whether* calls to the conference call service were routed to another party.[61] As Verizon knows, the Commission ultimately concluded that calls to conference call services terminate at the CSP's bridge. Verizon's apparent oversight of the Commission's consideration –and rejection – of the prepaid calling card orders is particularly puzzling in light of the discussion of the *Qwest* decision in Verizon's Opposition.[62] Regardless, it is clear that calls to conference call services terminate with the CSP and are not routed to other parties.

D. Stand Alone CSPs Do Not "Offer" Telecommunications And Thus Are Not Toll Resellers

Although the Commission already has ruled that stand alone conferencing companies are not telecommunications carriers and are end users of the inbound toll free

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59 *See, e.g., Prepaid Calling Card Order*, ¶2.

60 *See, e.g.*, Premiere Comments at 1-2.

61 *Qwest*, ¶34.

62 Verizon Comments at 5.

telecommunications they purchase from their underlying carriers, Verizon attempts to mischaracterize the relationship between conferencing companies and their underlying carriers as one between a carrier and a toll reseller. Specifically, Verizon states "InterCall's relationship with its underlying carriers is no different from any other resale relationship."[63] However, as InterCall and other commenters have consistently stated, they do not resell the toll free services that they purchase; rather, they make available a toll-free method to reach the conference provider. If Verizon's definition of "resale" were given any credence, every catalog center, reservation center, bank customer service department, etc. that relies on inbound toll free access would be classified as a toll reseller.

Several commenters pointed out that audio bridging providers do not offer or provide their subscribers with the capability to use the audio bridging provider's toll free telephone numbers to initiate or receive free calls other than to the conference bridging equipment.[64] Genesys explained in its comments:

> The toll-free 8xx service purchased by Genesys from registered telecommunications carriers is used by Genesys to enable customers of Genesys and other teleconference participants to access Genesys teleconference service. Genesys customers cannot use Genesys-provided 8xx service to enable third parties to call the Genesys customer. . . . Genesys does not resell toll-free 8xx service for such purpose.

Similarly, TeleSpan noted in its comments that audio bridging providers' use of toll free numbers is akin to that of a bank or credit card company that provides customers with a toll free

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63 Verizon Comments at 8.

64 *See, e.g.*, Canopco Comments at 4; Premiere Comments at 2; TeleSpan Comments at 5; Genesys Comments at 3. Specifically, Canopco stated that it "does not own its own transmission facilities and does not offer transmission services to its customers." Canopco Comments at 4. Similarly, Premiere noted that it "has not claimed a resale exemption from such [USF surcharges imposed by its underlying telecommunications providers]." Premiere Comments at 2.

number so that the customer can reach an automated system to check their account balances.[65] "A stand alone conference calling service provider is no different than myriad other businesses and information service providers that purchase 800 services from IXCs and use them to provide information and other services, whether online databases, reservation centers, florists, or mail order catalogue centers."[66]

Verizon's mischaracterizations notwithstanding, there is no question that stand alone audio bridging companies are not reselling telecommunications service or providing their customers with the ability to make or receive calls. Audio bridging service providers utilize toll free numbers to provide their services but do not offer or provide their subscribers with a separate telecommunications functionality. Clearly, the Commission agreed with that analysis when it closed its investigations of Raindance, Premiere and Genesys discussed above.

E. Recipients of USF Do Not Regard Teleconferencing as "Telecommunications"

Verizon's view that conferencing constitutes "telecommunications" stands alone in the proceeding. Indeed, even the independent telephone companies that are the primary recipients of USF's subsidies routinely treat their own conferencing products as "enhanced services," and not as "telecommunications." For example, each of the following independent carriers categorize their teleconferencing services as enhanced services:

- CenturyTel: "enhanced voice services (such as call forwarding, *conference calling*, caller identification, selective ringing and call waiting)."[67]
- FairPoint: "In addition, we offer enhanced features such as caller identification, call waiting, call forwarding, *teleconferencing*, *video conferencing*, and voicemail."[68]

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65 *See* TeleSpan Comments at 5.

66 *Id.*

67 CenturyTel, Inc., SEC Form 10-K, at 10 (filed Mar. 1, 2007) (emphasis added).

- Citizens Communications: "We also provide enhanced services to our customers by offering a number of calling features including call forwarding, *conference calling*, caller identification, voicemail and call waiting."[69]

Similarly, TDS Telecom refers to its provision of conference calling as a "premium" service and then includes conference calling with other enhanced services such as call forwarding and call waiting.[70] Windstream stated in its most recent 10-K that it "offers various enhanced service features including call waiting, call forwarding, caller identification, three-way calling, no-answer transfer and voice-mail."[71] Thus, even among local exchange telephone companies such as Verizon, conferencing is not generally regarded as a telecommunications service, and it is Verizon that is now attempting reclassify the offering for its own competitive advantage.

F. Audio Bridging Services Are Not Subject to USF Simply Because Common Carrier "Video Services" Are Part of the Contribution Base

In its comments, AT&T explains that it reports on its audio bridging revenues because Commission rule 54.706 includes "video services" in the list of services subject to direct universal service contributions.[72] AT&T then goes on to explain that "it seemed unlikely that the Commission would include video conferencing services but exclude audio teleconferencing services."[73] AT&T, however, misreads the rule. Essentially, AT&T has misinterpreted the Commission's reference to video services to include all video teleconferencing, then extrapolated

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68 FairPoint SEC Form 10-K at 4 (filed Mar. 13, 2007) (emphasis added).

69 Citizens Communications, SEC Form 10-K at 3 (filed Mar. 1, 2007) (emphasis added).

70 Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities, 16 FCC Rcd 6417 ¶ 77 (1999).

71 Windstream Corporation, SEC Form 10-K at 5 (filed Mar. 1, 2007).

72 AT&T Comments at 2; *see* 47 C.F.R. §54.706(a).

73 AT&T Comments at 3.

the obligations of audio conferencing services providers based on its first misinterpretation regarding video conferencing services.

In the *Universal Service Report and Order,* the Commission included only *common carrier* video services within the USF contribution base. Specifically, the Commission made clear that, "satellite and video service providers must contribute to universal service only to the extent that they are providing interstate telecommunications services."[74] It went on to state that entities that provided video conferencing services "on a common carrier basis" would contribute, but other providers would not.[75] This reference, which is cited by AT&T, raises more questions than it answers. Although the Commission appears to posit that "common carrier" video conferencing exists, it does not define the term, nor provide an example of the service that it may have been considering. Moreover, the passage suggests that the provision of video conferencing on a non-common carrier basis is not subject to USF. Entities that provide video conferencing as an information service, not as a telecommunications service, thus would not contribute to the Fund.

Further, Commission orders since 1997 contradict AT&T's contention that video conferencing is a common carrier service. Whatever the Commission may have meant in the *Universal Service Report and Order*, the Commission repeatedly has categorized video conferencing service as an information service.[76] In particular, references to video conferencing services appear repeatedly in the regulatory flexibility analysis portion of Commission orders,

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74 *Federal State Joint Board on Universal Service,* Report and Order, 12 FCC Rcd 8776, ¶ 781 (1997).

75 *Id.*

76 *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, FCC Rcd 14853, Appendix B, ¶¶ 54, 56 (2005); *Telephone Number Requirements for IP-Enabled* Services *Providers*, FCC 07-188, Appendix B, ¶¶ 54, 56 (Nov. 7, 2007); *Universal Service Contribution Methodology,* 21 FCC Rcd 7518, Appendix B, ¶¶ 139, 141 (2006).

are always discussed in relation to VoIP services and are mentioned with services such as online gaming, web browsing and instant messaging.[77] For example, in the *Wireline Broadband Classification Order,* the Commission states:

> "Our action pertains to VoIP services, which could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services."[78]

Based on these Commission references to video conferencing – which appear always to include video conferencing with other information services - audio conference calling service also would be classified as information services and would not be subject to direct USF contribution requirements. Thus, AT&T's assumption that video conferencing is included in the definition of video services is highly unlikely and the further extrapolation that audio conferencing is also meant to be included in the Commission's direct USF contribution requirements is even more doubtful.

III. THE 2002 REVISIONS TO THE FROM 499-A ARE NOT SUBSTANTIVE CHANGES OR RULES ON WHICH USAC CAN RELY FOR SUPPORT FOR ITS ADMINISTRATOR'S DECISION

A. The References to "Toll Teleconferencing" in the 499 Instructions Do Not Require Stand Alone Providers to Contribute Directly to USF

InterCall showed in its Appeal that the isolated portions of the Instructions relied upon by the USAC Administrator do not support the inclusion of audio conferencing services, such as those provided by InterCall, among those services on which USF contributions must be made. The two parts of the Instructions that refer to teleconferencing – those Instructions for

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77 *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, FCC Rcd 14853, Appendix B, ¶ 54. *See also, e.g., Telephone Number Requirements for IP-Enabled Services Providers*, 54; *Universal Service Contribution Methodology,* 21 FCC Rcd 7518, Appendix B, ¶139.

78 *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, FCC Rcd 14853, Appendix B, ¶¶ 54, 56.

lines 303 and 404 and for lines 314 and 417 of the 499-A Worksheet – were mere "editorial clarification" by the Common Carrier Bureau.[79] The Bureau's changes to the instructions were made to give guidance to entities that otherwise were required by Commission rule 54.706 to contribute to USF and provided telecommunications service in conjunction with their teleconferencing services, namely local exchange carriers ("LECs") and interexchange carriers ("IXCs").[80]

More specifically, regarding the Instructions to Lines 303 and 404, InterCall explained that the Instruction could only be construed to apply to local switched based teleconferencing services, such as three-way calling offered by LECs.[81] Neither the USAC Administrator nor any of the commenters suggested that this portion of the Instructions applied to InterCall.

InterCall went on to explain that the reference to "toll teleconferencing" in the Instructions to lines 314 and 417 was equally inapposite.[82] InterCall offered two potential interpretations of this reference. Either "toll teleconferencing" had to be offered through a local exchange or IXC switch – which is not the case with InterCall and most, if not all, stand alone audio conferencing providers – or toll teleconferencing referred to the toll component of a conferencing service provided by the carrier already filing a 499 Form (because the carrier self-provisioned that component, unlike a stand alone provider which purchased from a carrier).

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79 *See* 2002 Form 499-A Worksheet and Instructions, at 18 and 20 (instructions for lines 303 and 404; instructions for lines 314 and 417) (*2002 499-A Instructions*), available at: http://www.usac.org/_res/documents/about/pdf/499/499a_2002.pdf

80 Appeal at 18-22; *accord* Premiere Comments at 4 (references to "teleconferencing" were added as editorial revisions). As Genesys correctly notes, the Instructions for lines 314 and 417 must be read as being pertinent to explaining those lines only for entities that otherwise have to file Form 499-A, and not themselves as an expansion of who must file the form. Genesys Comments at 12.

81 Appeal at 18-20.

82 *Id.* at 20-22.

Notably, both AT&T's and Verizon's comments make clear that they consider their teleconferencing service to have both a toll component and a non-assessable non-toll component. Verizon notes that it "pays into the fund on the *telecommunications components* of its audio conferencing revenues,"[83] although, notably, it provides no further explanation what those components are.[84] Despite the lack of detail, Verizon's statement is actually consistent with InterCall's explanation of the purpose of the "editorial clarification" and reference to "toll teleconferencing" in the Instructions regarding lines 303 and 404: namely, these lines allow audio conferencing companies that self-provision the telecommunications component of audio conferencing services to report the telecommunications portion of their revenues on these lines.[85] In short, Verizon's practice, as an IXC-based provider of conferencing services covered by the Bureau's instruction, should not and does not have any bearing on the proper treatment of stand alone providers who independently obtain the telecommunications components of their services by purchasing them from telecommunications carriers and offer audio conferencing as an information service.[86] As noted earlier, InterCall and other stand alone providers are not reselling these telecommunications components and are not telecommunications service providers as a general matter.[87]

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83 Verizon Comments at 6.

84 While AT&T apparently pays on its entire audio conferencing revenues, based on its comments at 2, it is merely taking advantage of one of the FCC's safe harbors when a telecommunications carrier also provides non-telecommunications offerings in a bundled package. *See, infra,* Section IV.

85 *See* Appeal at 21.

86 By definition, all information services include a telecommunications component, as the features that make a service an information service are "offer[ed] . . . via telecommunications." *See* 47 U.S.C. §153(20). Taken to its logical conclusion, Verizon's argument would turn virtually all information service providers into contributors.

87 *See* Section II.E *supra*.

One commenter, Genesys, proffered an alternative interpretation of the Instructions for lines 314 and 417, which is even more narrowly circumscribed, albeit based on the same principles. Regarding the Instruction for line 417. Genesys suggests that the reference to "*toll* teleconferencing" is a narrow class of conferencing services. Some audio conferencing involves call participants accessing the audio bridge using toll interexchange services. Genesys explains that, unlike some other audio conferencing services, its services do not require customers or other end users calling into the audio conferencing bridge to make toll calls. Instead, their customers and conference calling participants make *toll-free* calls.[88] Significantly, as Genesys explained, the Instructions reference toll-free services when that is intended, so that the use of word "toll" to describe the teleconferencing services targeted by the instruction can only be construed as intentional and exclusive of "toll-free teleconferencing."[89] As such, line 417 and the associated Instruction does not apply to services, like those of Genesys and InterCall, which provide access through the use of toll-free 8XX numbers rather than toll services.

In sum, the Instructions upon which the Administrator relied do not serve as a basis that all audio conferencing providers, such as InterCall, are among those entities that must register with USAC contribute to the fund. Rather, the record reinforces InterCall's interpretation that the Instructions added by the Common Carrier Bureau provide additional guidance to entities that already must contribute that also provide teleconferencing, such as IXCs

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88 Genesys Comments at 13-14.

89 *See id.* at 13.

that offer teleconferencing services by self-provisioning the transport element.[90] They do not expand the list of entities required to contribute to USF.

B. The Common Carrier Bureau Did Not Have the Authority to Impose Contribution Obligations on a New Category of Entities by Amending the 499 Form

If the Instructions could somehow be construed as they were by the Administrator, then the Instructions would constitute substantive rules and, as such, would have been adopted without requisite authority by the Common Carrier Bureau, predecessor to the Wireline Competition Bureau.

The Commission has clearly circumscribed the authority delegated to the Common Carrier Bureau and, subsequently, the successor Wireline Competition Bureau with respect to USF. The Bureau itself has acknowledged that it possesses no authority to establish substantive rules or polices governing the universal service support mechanisms. In 2004, when modifying the deadline for filing revisions to Form 499-A, the Wireline Competition Bureau noted that the authority delegated to it by the Commission in the context of universal service was limited to the "administrative aspects of the [contributor] reporting requirements," and did not extend to the "substance of the underlying programs."[91] There, in a decision that is pending

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90 As explained in the Appeal, InterCall contributes indirectly to the Fund through surcharge payments made to its interexchange carrier vendors. Even AT&T notes that the continued exclusion of InterCall and other stand alone conference calling companies from the list of contributors does not diminish the Fund unless stand alone providers "mark-up" the telecommunications component of their service. *See* AT&T Comments at 5. But, as explained earlier in this Reply, InterCall does not resell or otherwise provide telecommunications service. Consequently, there is no "mark-up" of the telecommunications component. Accordingly, Verizon is simply flat wrong in its idle speculation that InterCall would pay substantially more than it is currently paying if it had to contribute to the Fund directly. *See* Verizon Comments at 7-8.

91 *Federal-State Joint Board on Universal Service,* Order, 19 FCC Rcd 1012, 1016 (2004) ("Reporting Requirements Order") *appl. for review pending.* In making these statements, the Bureau was simply acknowledging the limits on its delegated authority that the Commission had made very clear. *See 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of*

review before the full Commission, the Bureau sought to justify its changes to the Form 499-A Instructions on the grounds that they were "procedural, non-substantive changes to the administrative aspects of the reporting requirements."[92] In other words, the Bureau recognized that, while it could make certain changes regarding the Form and its Instructions, it could not make modifications to the USF program that amounted to substantive changes. That authority resides solely with the Commission, and can be accomplished only through rule changes following notice and comment proceedings.[93]

Prior to the revision, there was no indication in the Act, the Commission's Rules, or the Commission's Orders, that audio conferencing service providers were required to contribute to the USF. Thus, as a substantive matter, if the Administrator is right about the proper interpretation of lines 314 and 417 in the Section 499-A Worksheet, the Common Carrier Bureau's addition of the language established, *for the first time*, the obligation on audio conferencing providers to contribute to the Fund. As such, by creating this obligation, the addition of those lines in the Worksheet Instructions amounted to the creation of a new substantive obligation. If so, the inclusion of those lines in the Worksheet Instructions would be the adoption of a substantive regulation, which would exceed the limits to Bureau's authority.

Moreover, apart from questions of the Bureau's authority, if the Instructions are interpreted to add audio conferencing as a category of contributor, the Instructions independently would violate the Administrative Procedure Act ("APA") because those Instructions were not added through notice and comments rulemaking. Section 553 of the APA requires the

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Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, 14 FCC Rcd 16602, 16621, ¶¶39-40 (1999) ("*Carrier Contribution Reporting Requirements Order*"). *See also discussion in* InterCall Appeal at 17-18.

92 *Id.* at 1016, n. 31.

93 *See* Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553.

Commission and other agencies to afford notice of a proposed rulemaking and an opportunity for public comment prior to a rule's adoption. While there are exemptions from these requirements for "rules of agency organization, procedure, or practice,"[94] any exemptions to the notice and comment procedures of the APA must be narrowly construed so as to not defeat the purposes behind the notice and comment requirements.[95]

Similarly, the Bureau's changes cannot be given substantive effect by calling them "interpretative rules." As noted above, there is no rule that can reasonably be interpreted to provide that audio conferencing providers are subject to USF. As such the Instructions to lines 314 and 417 have no antecedent from which an "interpretation" that audio conferencing providers would have to pay would flow. Rather, the Instructions themselves, rather than a rule "interpreted by the Instructions," are seen as the source of InterCall's obligations, belying the notion that the Instructions at issue might be considered interpretive. As Genesys notes, after having reviewed the existing rule of the nineteen categories about who must pay, which is replicated at the beginning of the Worksheet and Instructions dealing with who must contribute, an audio conferencing provider would never conclude that perhaps it has to contribute to the USF.[96] Such providers simply would not have been on notice that they might have to contribute by examining the rules. To construe the addition of the Instructions to lines 314 and 417 as interpreting the existing rule is to utterly ignore limits on the flexibility of the English language. The rule simply cannot support the interpretation that the Instructions for lines 314 and 417 purportedly, according to the USAC Administrator, represent.

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94 *Reporting Requirements Order* at 1016.

95 *E.g., Reeder v. FCC, 865* F.2d 1298, 1305 (D.C. Cir. 1989); *Alcaraz v. Block*, 746 F.2d 593, 612 (D.C. Cir. 1984) ("the exceptions to section 553 will be 'narrowly construed and only reluctantly countenanced.'").

96 Genesys Comments at 12. *See also* Qwest Comments at 3 (absence of audio conferencing from the list puts into doubt the existence of a contribution obligation).

Setting aside the lack of a basis for the "interpretation" offered by the Bureau in 2002, interpretative rules are, at most, *non-binding* interpretations of agency policy. As the Sixth Circuit noted in *U.S. v. Cinemark USA, Inc.*:

> We have recognized a distinction between interpretative and substantive (or legislative) rules as follows: A legislative rule is one that "has the force of law," while an interpretive rules is "merely a clarification or explanation of an existing statute or rule" and is "issued by an agency to advise the public of the agency's construction of statutes and rules which it administers.', *citing*, *Guardian Fed. Sav. & Loan v. Fed. Sav. & Loan Ins. Corp.*, 191 U.S. App D.C. 135, 589 F.2d 658, 664-65 (D.C. Cir. 1978) (*quoting*, U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act at 30, n. 3 (1947)).[97]

The APA makes a distinction between legislative rules and interpretative rules.[98] Only legislative rules have "the force of law" and are binding upon entities subject to the agency's jurisdiction. Interpretations of those rules, by the Bureau, have no power to bind public parties if the legislative or substantive rules themselves do not achieve this effect.[99]

So the question comes down to whether the existing *rules* (setting aside the Instructions) can be said to support the inclusion of audio conferencing. By relying on the empty authority of the Instructions, the USAC Administrator sidesteps explaining how the existing rule supports the inclusion of audio conferencing providers. Significantly, the Instructions in question do not interpret the rule so much as simply create a new category of payer, accepting for the moment the plausibility of the USAC Administrator's reading. While the rule *can* support, as AT&T noted,[100] the addition of additional contributors beyond the 19 currently listed, that does not convert the Bureau's action to a mere interpretative act. To the contrary, the inclusion

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97 *U.S. v. Cinemark USA, Inc.*, 348 F.3d 569, 580, n. 8 (6th Cir. 2003).

98 *See* 5 U.S.C. § 553(b)(3)(A).

99 *See generally*, 5 U.S.C. § 553 (b).

100 AT&T Comments at 2.

of a new category of payor is a substantive legislative act beyond the authority of the former Common Carrier Bureau or the current Wireline Competition Bureau to undertake. Accordingly, assuming for the sake of argument that the USAC Administrator properly interpreted the Instructions for lines 314 and 417 of the Worksheet, those Instructions fail to have the force of law and they do not and cannot support the determination of the Administrator.

IV. VERIZON'S CLAIMS OF COMPETITIVE HARM ARE ILLUSORY BECAUSE INTEGRATED PROVIDERS ARE NOT REQUIRED TO PAY USF ON THE NON-TELECOMMUNICATIONS COMPONENT OF THEIR SERVICES

Verizon is the only commenter arguing that the indirect USF contributions made by CSPs are insufficient. Its claims, however, reflect an erroneous view of InterCall's position and of the competitive playing field between integrated and stand alone providers of audio bridging services.

A. Verizon is not Competitively Disadvantaged by Filing 499s Except to the Extent that it Voluntarily Reports More Revenues than the Commission Rules Require

Verizon alleges that the current industry practice constitutes an "artificial competitive advantage in the audio conferencing market."[101] The crux of Verizon's complaint is that InterCall and other stand alone providers pay USF via surcharges on the telecommunications they purchase from suppliers such as AT&T, Qwest and Verizon while Verizon argues that it "pays into the fund on the telecommunications component of its audio conferencing revenues."[102] InterCall agrees wholeheartedly with Verizon that Verizon *should* be contributing to the USF based on the self-provisioned telecommunications component of its audio conferencing services. InterCall also contributes to the USF based on the telecommunications component of its audio bridging service, but because it does not self-provision those

101 Verizon Comments at 1.

102 Verizon Opposition at 6.

telecommunications services, it contributes indirectly through the surcharge that its underlying carriers impose, collect and remit to the USF.[103] If Verizon is accurately contributing to the USF based solely on the telecommunications component of its audio bridging service then there should be no competitive disadvantage between it, as an integrated provider of conferencing, and standalone audio bridging providers. A disproportionate impact occurs only if Verizon is voluntarily paying more USF on its conferencing services than is strictly required by the rules.

Although Verizon is careful not to state it explicitly, in another place in its comments, Verizon implies that it may be contributing to the USF based on the *total retail revenues* from its audio conferencing services and that InterCall and other CSPs should do the same.[104] In particular, Verizon bemoans the supposed "artificial price distortions [that] result from allowing InterCall . . . to avoid contributing to the fund on its *retail revenues* as other providers do."[105] If Verizon means to say that it is contributing on its total retail revenues, Verizon and AT&T — which states that it has been contributing to the USF on the basis of its

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103 The record clearly shows that, as end user purchasers of telecommunications services, conferencing companies contribute indirectly to the USF by payments made to their underlying telecommunications carriers. *See, e.g.,* TeleSpan Comments at 5-6; Premiere Comments at 2, 6. TeleSpan succinctly explained "[u]nderscoring their end user status, stand alone conference calling service providers are typically assessed an FUSF surcharge by the IXCs that sell these services. Through this method, stand alone conference calling service providers pay millions of dollars into the FUSF annually through indirect methods." Premiere echoed this experience when it noted "[s]ince the inception of the Commission's USF contribution requirements, Premiere Global alone has paid millions of dollars in USF surcharges, which its vendors have remitted to USAC as part of their required USF contribution. Collectively, independent providers of audio bridging services undoubtedly have paid tens, if not hundreds of millions of dollars in USF surcharges."

104 *See, e.g.*, Verizon Comments at 6.

105 *Id.* Presumably, Verizon is implying that it is one of the providers that does contribute to the USF based on its retail revenues. A reference to InterCall in a later Verizon statement that customers "compare bids from InterCall and other providers who do pay into the fund on their retail revenues" apparently is a typographical error. *Id*

audio teleconferencing revenues in addition to the telecommunications component of those services[106] – have chosen as a matter of self convenience to place themselves in that position.

Specifically, USAC's instructions clearly contemplate that integrated providers of conferencing services -- such as Verizon and AT&T -- have both a self-provisioned telecommunications component and an information service component of their bundled conferencing offerings. Line 417 of the 499 Form is made available for reporting the assessable associated telecommunications revenue, and Line 418 is specified as the place to include the non-assessable information service revenue associated with the service.[107] Critically, the Commission specifically provides for two "safe harbors" to use for reporting the revenue from a bundled service offering comprising telecommunications and information service components.[108] One option is simply to report all revenue gleaned from the service, thereby treating all revenues as the telecommunications revenues for purposes of determining USF obligations.[109] This safe harbor is administratively expedient, and appears to be the "easy way" selected by AT&T (and possibly Verizon). The second safe harbor option is to report the retail value of the telecommunications component as assessable telecommunications revenue, and the balance as non-assessable information service revenue.[110] This second option is admittedly more difficult to administer, but if selected would put Verizon and AT&T in precisely the same economic position as stand alone CSPs that pay the FUSF surcharges of their underlying carriers.

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106 AT&T Comments at 5; Verizon Comments at 6-7.

107 *See* FCC Form 499-A, Lines 417 and 418.

108 *Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as amended1998 Biennial Regulatory Review -- Review of Customer Premises Equipment And Enhanced Services Unbundling Rules In the Interexchange, Exchange Access And Local Exchange Markets*, 16 FCC Rcd 7418, ¶¶ 48-55, ("*CPE Bundling Order*").

109 *Id.* at ¶¶ 51-52.

110 *Id.*

Importantly, other integrated providers already have availed themselves of the option of reporting the telecommunications component revenue separately, with USAC's apparent blessing. The practice was demonstrated, for example, in an audit involving ILD Telecommunications, Inc. and Intellicall Operator Services, In. (jointly "ILD").[111] In the ILD Request seeking review of a USAC Administrator's Decision resulting from that audit, ILD explained that USAC had determined that ILD's conference calling services were not subject to USF contributions:

> ILD provides a variety of enhanced conference calling services. USAC-[Internal Audit Division] and USAC-[Financial Operations Management] have agreed with ILD that these are enhanced services and are not subject to USF charges. However, they stated that the revenues for the basic telecommunications service component of those enhanced services should be broken out and included for purposes of calculating USF contributions.[112]

Based on this USAC determination, conferencing companies are correct in making USF contributions based only on the telecommunications component of their conference calling services. Further, the Form 499 allows filers to report separately the telecommunications input to a conferencing service and the enhanced service functionality provided via the telecommunications services. Significantly, in the Administrator's Decision at issue, USAC did not require InterCall to contribute to the fund based on all of its revenues – only on the telecommunications component of the service.

Therefore, to the extent Verizon or AT&T contributes to the USF based on all of their conference calling revenues, they simply are electing to pay more than is required as a matter of their own administrative convenience. Thus, there is no uneven competitive playing

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111 *In re Request for Review by ILD Telecommunications, Inc. and Intellicall operator Services, Inc. of Decision of the Universal Service Administrator*, CC Docket Nos. 96-45 and 97-21; USAC Audit Report No. CR2004CP019 (Mar. 31, 2006) ("ILD Request").

112 ILD Request at 30.

field unless the carriers have chosen to create one voluntarily and for reasons of their own. In any event, neither Verizon or AT&T provide *any* evidence that they have suffered any harm from the choices they have made. As Premiere points out:

> There is no indication that the Commission's past practice of not requiring independent providers of audio bridging services to contribute directly to USF as carriers has advantaged them in relation to audio bridging providers who are affiliated with telecommunications carriers. . . . Moreover, the audio bridging industry as a whole is highly competitive, and telecommunications carriers hold some of the largest market shares. It is unlikely that they could acquire such market shares while bearing significantly greater USF contribution costs than those borne by independent providers of audio bridging services. [113]

If Verizon and AT&T simply elected, as is their right, to contribute to USF solely on the basis of the telecommunications component of their service, they would be in the same economic position as other CSPs that pay their underlying carriers and this would alleviate the competitive disadvantage that they allegedly suffer.

B. Allocation of Telecommunications and Non-Telecommunications Revenues is Beyond the Scope of this Appeal

The issue which sparked the most disagreement by commenters — precisely how service providers should allocate the assessable telecommunications input and non-assessable non-telecommunications component of the service — is not even an issue raised by InterCall in its Appeal. The record shows that Verizon, AT&T and perhaps Qwest employ different methodologies to determine the amount of revenue to report on the 499 Forms. These differences may or may not result in these carriers reporting revenues from providing audio bridging service in different ways. Although InterCall understands the uncertainty that these carriers face, the issue of how to allocate revenues is not before the Commission in this Appeal.

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113 Premiere Comments at 7-8.

InterCall has just now been ordered to file FCC Form 499s reporting "toll teleconferencing" revenues. InterCall has not yet reported any revenues to USAC, and USAC has not taken a position on how InterCall is to allocate its revenues for Form 499 purposes. (If InterCall is granted a stay, which is justified here, then this issue will be moot as it relates to InterCall.)

Therefore, any issues concerning how 499 filers should allocate revenues between telecommunications and non-telecommunications components is beyond the scope of this Appeal. The Commission should address that question in a proper forum.

V. THE COMMISSION SHOULD STAY USAC'S INSTRUCTION TO FILE CURRENT AND PAST DUE 499 FORMS

Under the Commission's test for a petition for stay,[114] a petitioner must demonstrate: (1) it is likely to succeed on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.[115]

Most commenters did not address directly InterCall's petition for a stay. Nevertheless, the record shows that granting a stay is warranted in this instance. First, InterCall is likely to prevail on the merits – and, most importantly, likely to prevail on its claim that USAC cannot hold InterCall liable for any retroactive USF payments. Second, a stay of USAC's decision will prevent irreparable harm to InterCall arising from compliance with the 499 reporting obligation and similar harm to other stand alone audio bridging providers that may be

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114 *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("*Virginia Petroleum Jobbers*").

115 *Charter Communications Entertainment I, LLC Petition for Determination of Effective Competition in St. Louis, Missouri*, Memorandum Opinion and Order, 12 FCC Rcd 13890 ¶ 4 (rel. July 31, 2007) ("*Charter Communications*"); *In the Matter of Comcast Cable Communications, LLC Orders Setting Basic Equipment Rates Petition for Emergency Stay*, Order, 20 FCC Rcd 8217, ¶ 4 (2005);

subjected to a similar requirement. Third, a stay preserves the status quo while the Commission considers the substance of InterCall's appeal, without unduly affecting carriers or the Fund. Finally, a stay will prevent unnecessary and costly litigation over retroactive payments, thereby furthering the public interest.

A. InterCall has a High Likelihood of Success on the Merits

The first, and most important, criterion for granting a stay is likelihood of success.[116] As shown previously in this Reply, the USAC decision erroneously characterizes audio bridging services and upends decades of established practice that stand alone providers contribute indirectly to USF as end user customers, rather than as carriers.[117] Thus, on the question of whether audio bridging providers are required to contribute directly to USF in the future, InterCall is highly likely to prevail on the merits.

More immediately, InterCall also is likely to prevail on the question of whether USAC may require InterCall to contribute to the Fund prior to the issuance of an FCC order, *i.e.*, whether retroactive contribution obligations may be imposed. On this question, InterCall is likely to prevail because (a) USAC acted beyond its authority by failing to seek FCC guidance before acting and (b) any FCC order adding audio bridging services to the contribution base lawfully could apply only on a prospective basis.

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116 The most important element in evaluating a petition for stay is the likelihood the petitioner will succeed on the merits. *See Brunson Communications, Inc. v. RCN Telecom Services, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 12883 ¶ 2 (rel. July 21, 2000) ("The likelihood of success on the merits is an important element in a petitioner's showing."); *Charter Communications Entertainment I, LLC Petition for Determination of Effective Competition in St. Louis, Missouri*, Memorandum Opinion and Order, 12 FCC Rcd 13890 ¶ 4 (rel. July 31, 2007) ("*Charter Communications*") ("If the petitioner makes a strong showing of likely success on the merits, it need not make a strong showing of irreparable injury").

117 *See, supra,* Section II.

First, no commenter disputed InterCall's analysis of USAC's obligations under Section 54.702(c) of the rules. USAC is an administrative body authorized to carry out the Commission's policies. It does not have the authority to change policy or to interpret statutes, the FCC's rules, precedent, or unclear instructions.[118] Where there is ambiguity in the rules, USF forms, or precedent, the FCC's instructions are clear: USAC *must* seek guidance from the Commission.

USAC's decision here rests entirely on a single statement in the 499 Instructions that refers to "toll teleconferencing" revenues. However, InterCall and other parties showed that this Instruction could not be read in a vacuum. Indeed, proper reconciliation of this Instruction with the abundance of other evidence that audio bridging providers are not telecommunications carriers required USAC to interpret statutes, the FCC rules and/or unclear instructions. As noted by Premiere, "an online search of the Code of Federal Regulations indicates that the terms "teleconference," "teleconferencing," "audio conference," "conferencing," and "bridging" do not appear ***anywhere*** in the Commission's regulations."[119] Despite the complete lack of guidance by which to interpret the term "toll teleconferencing," USAC forged ahead into an unclear area – the very action that is prohibited by Section 54.702(c) of the rules. Accordingly, USAC's order – including the instruction that InterCall file 499s retroactively – is beyond the Administrator's authority.

Second, even if USAC had authority to issue a decision, the Administrator's Decision erroneously imposes retroactive liability on InterCall. InterCall is highly likely to prevail on its claim that USAC could not single out InterCall in this manner. To the contrary, as discussed in more detail below, the addition of audio bridging providers to the contribution base

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118 InterCall Appeal at 17-22; *see also supra,* Section III.

119 Premiere Comments at 4.

requires an FCC order, and there are only two ways in which the FCC might issue such an order. Under either method, the FCC order could apply only on a prospective basis. Therefore, even if the correct policy is for all audio bridging providers to contribute to the Fund, the imposition of retroactive liability is unlawful. A stay is warranted of USAC's order to the extent that it requires submission of Form 499s and payment of USF for any period prior to the effectiveness of an FCC order requiring all audio bridging provider to contribute to the Fund.

1. Section 254(d) Only Permits the FCC to Add Audio Bridging Providers on a Prospective Basis

The first way in which the FCC might add audio bridging providers to the USF contribution base was discussed by InterCall in its appeal. Specifically, using its authority under Section 254(d) of the Act, the FCC has authority to add non-carrier "providers of telecommunications" to the contribution base, provided it determines as a policy matter that such action is in the public interest.[120] As of today, the Commission has exercised this authority only to include private carriers, interconnected VoIP providers and payphone operators in the category of permissive contributors. Accordingly, audio bridging providers have not been included in the category of permissive contributors. If the Commission were to do so in an appropriate proceeding, such action is rulemaking and, accordingly, the new contribution requirements could only apply prospectively.[121]

Critical to the analysis of InterCall's Petition for Stay, no commenter disputed InterCall's analysis of the Commission's Section 254(d) authority. Thus, it is undisputed that an action to include audio bridging providers under the "permissive" authority could apply

120 *See* InterCall Appeal at 23-26.

121 *See Bowen v. Georgetown University Hospital,* 488 US 204, 208-09 (1988).

prospectively only. USAC's attempt to impose liability on InterCall prior to the effectiveness of such an order, therefore, is impermissible.

2. Alternatively, Even if the FCC Were to Conclude that Audio Bridging is a Telecommunications Service, It Could Not Apply the Decision Retroactively

The only opposition to InterCall's appeal urges the Commission to make a finding that InterCall's stand-alone audio bridging services are telecommunications services and, more specifically, "toll teleconferencing" as that term is used in the 499 Instructions.[122] Elsewhere in this reply, InterCall thoroughly explains why such a finding would be incorrect as a legal matter. For purposes of evaluating InterCall's Petition for Stay, however, even if the opposition were correct, relevant DC Circuit precedent makes clear that the FCC would be prohibited from applying any classification of audio bridging services retroactively. Thus, regardless of how the Commission ultimately classifies audio bridging services, InterCall could not be held liable for retroactive USF contributions and, again, InterCall is likely to prevail in its appeal of the retroactive effect of USAC's decision.

Adjudicatory decisions, like the classification that Verizon requests the Commission to make in this case, generally are given retroactive effect.[123] The courts, however, have recognized restrictions on the ability of agencies to apply adjudications retroactively. The D.C. Circuit, for example, distinguishes between agency decisions that "substitut[e] . . . new law for old law that was reasonably clear," and those which are merely "new applications of existing

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122 Verizon Comments at 2-6.

123 *See SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). (holding that "[e]very case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency").

law, clarifications, and additions."[124] In the former case, when an agency decision changes a view of the law that has come to be viewed as well-settled and long accepted, for which parties have reasonably relied to their detriment, agencies may not apply their decisions retroactively.[125] In the latter case, the presumption of retroactivity will be departed from only when to do otherwise would lead to a "manifest injustice."[126]

The leading test was established by the D.C. Circuit in *Retail, Wholesale & Dep't Stores Union v. NLRB*.[127] In that case, the court enunciated a non-exhaustive list of five factors to consider in determining whether retroactive application of a rule announced in an agency adjudication is appropriate. Those factors are:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an existing unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[128]

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124 *Verizon Telephone Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) ("*Verizon*") (internal quotation marks omitted).

125 *See Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993); *Clark Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1083-84 (D.C. Cir. 1987) (en banc).

126 *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir 2001); s*ee also Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc) ("*Clark-Cowlitz*"); *Consolidated Freightways v. NLRB*, 892 F.2d 1052, 1058 (D.C. Cir. 1989).

127 *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972). The Commission recently applied this methodology in analyzing whether to retroactively apply its decision regarding the regulatory classification of certain prepaid calling cards. *Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, 12 FCC Rcd 7290, 7305 (¶¶ 42-43) (2006).

128 *Id.*

As the D.C. Circuit subsequently explained, these factors "boil down to . . . a question of concerns ground in notions of equity and fairness."[129]

Any decision in this case to classify audio bridging providers as telecommunications carriers would "substitute new law for old law that was reasonably clear." The second factor of the *Retail, Wholesale* test, which captures this concept,[130] requires the court to gauge the unexpectedness of a rule and implicitly recognizes that the longer and more consistently an agency has followed one view of the law, the more likely it is that private parties have reasonably relied to their detriment on that view.[131] Here, as InterCall made clear in its Petition, stand-alone audio bridging services have always regarded themselves as end users, and neither the FCC, state PUCs, or USAC have exercised jurisdiction over them. The comments of Premiere, Genesys, Canopco and TeleSpan all confirm this long-standing understanding. As Canopco explained,

> Since the inception of the USF, stand alone providers of audio bridging services have not been classified as telecommunications service providers and have not filed FCC Form 499s as direct contributors to the Fund. Instead, the audio bridging industry has

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129 *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (citations omitted).

130 *See, e.g., Retail, Wholesale & Dep't Stores Union v. NLRB*, 466 F.2d at 391 (prohibiting retroactive application of a change in a "well established and long accepted" policy where such application would punish parties for complying with prior policy); *Microcomputer Technology Inst. v. Riley*, 139 F.3d 1044, 1051-1052 (5th Cir. 1998) (overturning retroactive application of a new standard where a party had relied on a different pre-existing standard described in a memorandum from the agency's general counsel). *See also NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860-61 (2d Cir. 1966) ("the problem of retroactive application has a somewhat different aspect in cases not of first but of second impression, where an agency alters an established rule defining permissible conduct which has been generally recognized and relied throughout the industry that it regulates. As a result of the nature of the task Congress has confided to the agencies and the vagueness of the directions it has given, they are, and ought to be, much likelier to engage both in new departures and in alterations than courts with their more limited 'molecular motions,' and this makes it peculiarly important for them to take full advantage of their power to act prospectively, whether by rule-making or adjudication.") (citations omitted).

131 *See Clark-Cowlitz Joint Operating Agency*, 826 F.2d at 1083.

> contributed to USF as end users, paying substantial amounts to the IXCs who provide them with toll-free services customers use to connect to the audio bridge.[132]

Similarly, Premiere explains that when it entered the market for audio bridging services in 1998, it understood that such services were not regulated common carrier services.[133] Likewise, Genesys states that it did not register as a telecommunications service provider and did not pay FUSF fees directly based specifically on its reliance upon the Commission's acceptance of Genesys' response to a 2005 Reseller Survey initiated by the Commission.[134]

In fact, that Reseller Survey demonstrates a prior FCC policy of non-regulation that is "reasonably clear." The record shows that the FCC investigated at least four providers in the industry – Raindance, CNE, ILD and Genesys – that each of these four providers offered the FCC the same interpretation of the FCC rules, and that the FCC knowingly closed investigations of each as a result. An order now classifying stand alone audio bridging services as telecommunications services subject to retroactive FUSF reporting and contribution requirements would represent a wholesale turnaround from established Commission policy.[135] As such, it could only be applied on a prospective basis.

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132 Canopco Comments at 3.

133 Premiere Comments at 2.

134 Genesys Comments at 4. In 2005, Genesys received a letter from the Commission directing Genesys to respond to a survey being conducted of companies identified by one or more telecommunications carriers as being resellers of telecommunications services. Genesys explained that the Commission, after inquiry and response, has not disputed that Genesys is the end user of toll-free 8xx service and not a reseller. In particular, in the more than three years that have elapsed since Genesys responded, Genesys has received no indication from the Commission that the Commission deems Genesys to be a reseller of telecommunications service or that Genesys should register and pay USF fees.

135 Further, there is no legitimate "statutory interest in applying a new rule despite the reliance of a party on the old standard" for the retroactive application of FUSF reporting and contribution requirements on stand-alone audio bridging services. *Retail, Wholesale,* 466 F.2d at 390. It simply cannot be that any statutory purpose is advanced by exposing the stand alone audio bridging industry to the endless disputes and general chaos that retroactive application of FUSF reporting and contribution requirements on stand-alone

B. InterCall Would Suffer Irreparable Harm from Retroactive Application of the USAC Decision

The practical effects of the USAC decision will cause significant harm to InterCall that will not be recoverable if the decision is overturned and substantially harm the teleconferencing industry as a whole. As with the likelihood of success factor, the harms to InterCall are particularly acute with respect to potential retroactive application of the Administrators' Decision.

Verizon argues that a stay should be denied because InterCall has not documented any actual loss of customers due to the USAC order.[136] A petitioner is not required to show that it has suffered harm prior to requesting a stay. Rather, a petitioner must show that the harm is "certain and great and of such imminence that there is a clear and present need for equitable relief."[137] InterCall meets this standard.

If allowed to take effect, USAC's decision would impose two significant and unrecoverable economic harms. First, any retroactive liability for USF would be virtually impossible for InterCall to recover. Over time, many of InterCall's customers have changed, making it impossible to collect past due USF from its former customers. Even for customers that still receive service from Intercall, it is unlikely that InterCall could successfully impose retroactive surcharge, whether due to contractual limitations or customer resistance to such unexpected charges.

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audio bridging service providers would engender. *Cf. McDonald v. Watt*, 653 F.2d at 1046 (holding that the relevant statutory purpose would be affirmatively frustrated where retroactive application of a new rule would create "chaotic, piecemeal title challenge(s)" to leasehold rights). (citation omitted).

136 Verizon Comments at 10.

137 *Iowa Utilities Board v. Federal Communications Commission*, 109 F.3d 418, 425 (8th Cir. 1996).

Second, any retroactive obligation would force InterCall to expend significant amounts of resources, time, and money to modify its billing and accounting procedures to classify revenues in the manner required for Form 499 reporting. Verizon correctly pointed out that it is generally understood that mere economic loss is not irreparable.[138] However, the threat of *unrecoverable* economic loss does qualify as irreparable harm.[139] Precedents stating that economic loss, in and of itself, does not constitute irreparable harm, "rest on the assumption that the economic losses are recoverable."[140] Here, InterCall's loss is certain, significant, and beyond recovery even if the USAC decision is overturned.

The efforts necessary to comply with USAC's decision will be much greater than mere "administrative hassles."[141] InterCall has never been subject to USF reporting and contribution requirements. Simply creating the methodology to identify relevant revenues and to disaggregate revenues as required to complete the Form 499 will constitute significant financial investment. InterCall will have to conduct a resource-heavy and time consuming analysis of its service offerings to determine which aspects of its conference calling services fit within the undefined term "toll conferencing." All these efforts and costs are required immediately in order

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138 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* 11 FCC Rcd 11754 ¶ 8 (1996).

139 *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) ("*Multi-Channel TV Cable Co.*"); *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994).

140 *Iowa Utilities Board v. Federal Communications Commission*, 109 F.3d 418, 426 (8th Cir. 1996).

141 Verizon Comments at 12.

to comply with USAC's order requiring retroactive filing.[142] None of these costs could be recouped if InterCall ultimately prevails in this proceeding.

Further, if the Decision's applicability is expanded to other stand alone providers, the resulting imposition of USF reporting and contribution requirements will significantly harm the teleconferencing industry as a whole. The operating margins for stand alone providers have become increasingly narrow due to competition from IXCs that are able to bundle their conferencing services with other services.[143]

> While total conferencing minutes continue to grow in the United States, although at slower rates than in the late 1990s and the early part of this decade, revenues per minute have actually been falling by double digit percentage points in each of the past six years…In this environment, it has become increasingly much more difficult for stand alone conference calling service providers to achieve and maintain profitability.[144]

Forcing stand alone conference calling providers to contribute to the fund based on their end user revenues will further limit their profit margins.[145] This will ultimately hurt consumers because many stand alone providers will not be able to absorb the increase compliance costs and consumers will lose a large source of competitive services.

C. InterCall's Irreparable Harm Outweighs Any Harm to Other Interested Parties by Preservation of the Status Quo

It is inequitable to place significant burdens on InterCall alone when the issues presented by the USAC decision apply to an entire industry. Granting the stay will prevent undue harm to InterCall, and other stand alone providers, while affording the Commission an

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142 On an ongoing basis, InterCall would incur costs in creating billing systems, in administering USF and in reporting future forms. These costs also would not be recoverable by InterCall.

143 TeleSpan Comments at 3.

144 *Id.*

145 *Id.*

opportunity to comprehensively review the issues. Also, maintaining the status quo will not result in significant harm to IXCs or the Fund.

First, InterCall cannot stress enough that stand alone conference calling providers are currently contributing to the Fund through end user charges. As Qwest points out, preserving the status quo will "avoid the harmful effects of a USAC mandate that will impose inappropriate double contributions into the fund."[146] Moreover, as Premiere aptly stated, "[t]here...is no indication that the Commission's past practice of not requiring independent providers of audio bridging services to contribute directly to the USF as carriers has advantaged them in relation to audio bridging providers who are affiliated with telecommunications carriers."[147]

Second, the theoretical harm described by Verizon and AT&T – that they are at a competitive disadvantage because stand alone conferencing providers do not pay directly into the Fund – is illusory. [148] Both Verizon and AT&T confirm that they self-provision the transmission capacity that stand alone providers purchase as end users. It is Verizon and AT&T that would have an advantage if they did not report these revenues *somewhere* on the Form 499, for without reporting revenues attributable to self-provisioned capacity, Verizon and AT&T would in effect receive this capacity at an 11% discount. Thus, in order for USF to be assessed in a neutral way, integrated providers must report directly to USF in some way that accounts for their self-provisioned capacity.

This does not necessarily mean, however, that Verizon and AT&T must pay more than stand alone providers under the status quo. While we are not able to verify exactly how either entity reports USF for these services, it appears that both carriers have available strategies

146 Qwest Comments at 1-2.

147 Premiere Comments at 7.

148 *See infra,* Section IV.

that permit equal treatment. Any decision to contribute more than what stand alone providers contribute is the result of choices or administrative convenience elected by the reporting carrier.[149]

D. Granting the Stay will be in the Public Interest

Finally, if conference calling providers are required to contribute retroactively, the results could be catastrophic.[150] "The practical effect of a denial of InterCall's Appeal would be to subject the entire audio bridging industry to the specter of retroactive liability for duplicative USF contributions that would devastate the industry."[151] If stand alone providers are required to pay past due contributions, they face a high risk of double-payment of USF obligations. The record clearly shows that litigation is likely to result from any attempt to recover contributions made through end user charges.[152] AT&T, for example, warned:

> If the Commission directs InterCall to contribute directly to the universal service fund based on its transport revenues from prior years, AT&T will be unable to revise its previously filed 499-A forms, going back more than one year, to reclassify the transport revenues associated with InterCall from end user to carrier's carrier revenue in order to refund InterCall.[153]

To obtain refunds from vendors, InterCall would likely have to sue its vendors, prompting a lengthy legal battle to obtain funds already contributed to the Fund. Even if stand alone providers could recover from their underlying telecommunications carriers, "the result would simply force those vendors to bear the loss because of the one year limitation on filing

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149 *Id.*

150 *See* TeleSpan Comments at 3.

151 Premiere Comments at 5.

152 *Id.* at 6 ("The USAC Administrator blithely suggested that 'InterCall may wish to seek reimbursement from its [vendors] for the amount of any USF contribution associated with the lines it purchased to avoid…double payment,' but as InterCall has discussed, any such effort likely would be unavailing").

153 AT&T Comments at 5.

revisions to Form 499 that reduce a filer's USF contribution liability."[154] In either situation, the Fund is likely to recover *more* than it should have during these prior periods. It is not in the public interest to countenance an over-recovery in this manner. Moreover, it is not in the public interest, as Qwest points out, to "disrupt existing customer relationships and cause protracted disputes between audio conferencing providers and their underlying carriers, all for the unnecessary 'benefit' of double payments to the FUSF."[155]

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154 Premiere Comments at 6.

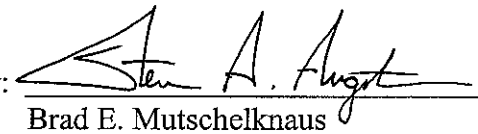
155 Qwest Comments at 4.

CONCLUSION

For the reasons identified and addressed above, InterCall requests that the Commission vacate the Administrator's Decision and prohibit USAC from requiring InterCall to submit Form 499-A filings on both a retrospective and prospective basis. In addition, pending completion of the Commission's review of the appeal, InterCall requests that the Commission stay the effectiveness of the Administrator's Decision.

Respectfully submitted,

INTERCALL, INC.

By: 

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